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No. 91-1099

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1991

KENNETH M. WALTON,
DBA WALTON BACKHOE SERVICE
and K. WALTON ENTERPRISES, INC.,
DBA LAW PLUMBING CO.,
Petitioners,

VS.

OPERATING ENGINEERS PENSION TRUST,
OPERATING ENGINEERS HEALTH & WELFARE FUND,
OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS
TRUST and OPERATING ENGINEERS TRAINING TRUST,
Respondents.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly conclude the District Court did not clearly err in finding that Walton operated Walton Backhoe Service, Law Plumbing Company and Law Plumbing Co., Inc., as a single, integrated business enterprise?

2. Did the Court of Appeals properly conclude the District Court did not clearly error in finding that Kenneth M. Walton and K. Walton Enterprises, Inc., are alter-egos?

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Respondents.

BRIEF IN OPPOSITION

Respondents Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust respectfully pray that the petition for a writ of certiorari filed in this case should be denied for the reasons stated below.

STATEMENT OF THE CASE

Respondents ("Trusts") are employee benefits plans who filed a breach of contract action against petitioner Kenneth M. Walton ("Walton") in the U. S. District

Court for the Central District of California. The complaint asserted jurisdiction under § 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a), and § 502(e) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(e), to enforce a written collective bargaining agreement between Walton and the International Union of Operating Engineers, Local Union No. 12 ("Local 12"). After discovery proceedings, the Trusts filed an amended complaint naming K. Walton Enterprises, Inc. ("Walton Inc."), as an additional defendant based upon an alleged alter-ego relationship between Walton and Walton Inc. A bench trial was conducted on December 12 and 13, 1989.

On March 30, 1990, judgment in favor of the Trusts was entered against Walton and Walton Inc., jointly and severally, in the amount of $84,975.55. *Pet.* 26a. In its findings of fact and conclusions of law filed the same date, the District Court found that at all times after January 1, 1986, Walton operated a single integrated business under the names Walton Backhoe Service, Law Plumbing Co. and Law Plumbing Co., Inc. The District Court further found that Walton and Walton Inc. were alter-egos of each other, that Walton had used Walton Inc. as a technical change in operations to attempt to avoid contract obligations to the Trusts, and that adhering to the fiction of a separate existence for Walton and Walton Inc. would sanction a fraud. *Pet.* 13(a).

On appellate review, the Court of Appeals tested the District Court's findings of fact under the clearly erroneous standard of Rule 52(a), F.R.Civ.P. The Court of Appeals concluded that the evidentiary record "fully supports" the finding that Walton operated a single integrated business enterprise under the names Walton

Backhoe Service, Law Plumbing Co. and Law Plumbing Co., Inc. *Pet.* 4a.

The evidentiary record shows that Walton opened a bank acount under the name Walton Backhoe Service in April, 1985, but closed that account in March, 1986, after opening a new bank account under the name Law Plumbing Co. as of January 1, 1986. Walton formed Walton Inc. in February, 1986. However, Walton personally owned and controlled the bank account for Law Plumbing Co. The bookkeeping for the entire business "just sort of got put together," and was centered upon that single bank account. Walton testified that after January 1, 1986, only one set of books and records was maintained for Walton Backhoe Service and Law Plumbing Co. The business had one office. All employees and business expenses were paid from the Law Plumbing Co. bank account, and all income from the business was deposited into that bank account.

By March, 1986, Walton's employee Kinsley had told Walton that he would leave Walton's employment to work for an employer signatory to a collective bargaining agreement with Local 12 unless Walton signed such an agreement with Local 12. On March 10, 1986, Walton and Kinsley went to the office of Local 12 and met with a Local 12 representative. During that meeting, Walton executed a short form collective bargaining agreement ("Agreement"), and Local 12 dispatched Kinsley to work as an employee covered by the Agreement.

In executing the Agreement, Walton stated his business name to be Walton Backhoe Service. Walton never told Local 12 or the Trusts that Kinsley was being paid through a bank account maintained under the name Law Plumbing Co. Walton paid contributions to the Trusts on Kinsley's behalf by cashier's checks purchased with funds from the Law Plumbing Co. bank account, apparently as a deceptive tactic. For a time, Walton reported only a

portion of Kinsley's hours rather than all hours of employment as required by the Agreement, and never reported similar work by others (including owner-operators and subcontractors) as required by the Agreement.

REASONS FOR DENYING THE PETITION

I.

THE PETITION PRESENTS NO SUFFICIENT REASON FOR GRANTING REVIEW.

The petition shows no reason for granting review contemplated by Rule 10 of this Court. No conflict with the decision of another U. S. Court of Appeals is shown. No departure from the usual course of judicial proceedings is shown. No important question of federal law which has not been settled is shown. Indeed, the petition manages to make an argument for review only by misstating the factual record and by ignoring the legal significance of conceded facts.

The Court of Appeals elected to decide this appeal without oral argument, and disposed of the appeal by an umpublished memorandum. *Pet.* 1(a). The disposition by the Court of Appeals remains unpublished despite a request for publication by the Trusts made in an effort to avoid future, needless trials and appeals of a similar nature. The case involves a simple contractual liability of a sole proprietor employer (Walton) who personally signed a collective bargaining agreement and attempted to avoid the agreement by forming a shell corporation (Walton Inc.), but Walton never even put his business into the shell corporation.

II.

WALTON'S LIABILITY UNDER THE COLLECTIVE BARGAINING AGREEMENT DOES NOT REQUIRE PIERCING THE CORPORATE VEIL OR APPLICATION OF THE SINGLE EMPLOYER DOCTRINE.

Walton signed the Agreement with Local 12 as an individual solē proprietor using the fictitious name of Walton Backhoe Service. Walton opened the bank account using Law Plumbing Company as his fictitious business name, but certainly he remained the same individual contractually bound to the Agreement. The petition concedes that Walton "stupidly" commingled the funds of his various alleged "entities" in a single bank account (*Pet.* 7), but fails to acknowledge that Walton's treatment of all such funds as his own is probative evidence that Walton himself was the employer conducting the business.

On this factual record, no need arises to "pierce the corporate veil" of Walton Inc. in order to hold Walton liable under the Agreement. Walton himself is personally signatory to the Agreement.

The doctrine of piercing the corporate veil would be relevant only if: (1) Walton Inc. had actually conducted the business of the employer; and (2) Walton Inc. was bound to the Agreement. In that circumstance, the contactual liability of Walton Inc. to the Trust might be traceable to Walton himself by "piercing the corporate veil." Those facts simply do not exist in this case, so the doctrine is irrelevant. Likewise, the "single employer" doctrine of the National Labor Relations Board is irrelevant, since no issue concerning an employer's duty to bargain with a labor union under the National Labor Relations Act ("NLRA") exists in this action. *Fall River*

Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 40-41, 107 S.Ct. 2225, 2234-35 (1987).

The Court of Appeals cited its previous decision in *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988), on a point of contractual interpretation. *Pet.* 5. *A-C Co.* interprets the Agreement as obligating Walton to pay contributions to the Trusts on all hours of employment of his employees, even if some hours are worked under different fictitious business names. *A-C Co.* establishes no new legal principle by which a non-signatory employer is bound to a collective bargaining agreement.

The petition struggles at length to mount an attack on the "legal concept" of "single integrated business" (*Pet.* 16), but fails to grasp that the District Court found as a *fact* that Walton operated Walton Backhoe Service, Law Plumbing Co. and Law Plumbing Co., Inc., as a "single integrated business." In that factual circumstance, Walton's obligations to the Trust under the Agreement do not depend upon legal doctrines involving "single employer," "successorship" or "piercing the corporate veil."

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III.

THE DISTRICT COURT'S FINDING OF FACT THAT WALTON INC. IS THE ALTER-EGO OF WALTON WAS NOT CLEARLY ERRONEOUS, AND PRESENTS NO ISSUE WORTHY OF REVIEW BY THIS COURT.

The liability of Walton Inc. under the Agreement as an alter-ego of Walton is almost immaterial from a practical viewpoint, because the facts show that neither the business, nor the business income, nor the equipment acquired by Walton was actually put into the corporation. The

record contains no evidence that corporate stock was ever issued by Walton Inc., no evidence that a board of directors was elected, no corporate minutes, and no corporate tax returns. The Trust will likely enforce their judgment, if at all, against Walton, who has the assets of the business.

Nevertheless, the District Court properly found as a fact that Walton attempted to use the incorporation of Walton Inc. "as a technical change in operations to attempt to avoid the obligations of the Agreement." *Pet.* 17. 13(a). The District Court further found as facts that adherence to the legal fiction of a separate existence between Walton and Walton Inc. would "promote and sanction a fraud and injustice" (*Pet.* 14(a)), and that Walton and Walton Inc. are "alter-egos" of each other. *Pet.* 13(a). The Court of Appeals reviewed these findings and the evidentiary record and found them to be supported by the record and, therefore, not clearly erroneous. Since the findings of fact were not clearly erroneous, the Court of Appeals properly affirmed those findings as required by Rule 52(a), F.R.Civ.P. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969).

The petition closes by asking this Court to prevent a "significant injustice" by making "a closer examination of the facts" in this case. If Walton's counsel had done precisely that — examined the facts more closely — both the appeal and the petition would have been viewed correctly as unwarranted additions to Walton's financial burdens.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari to the U. S. Court of Appeals for the Ninth Circuit should be denied.

Dated: January 17, 1992

Respectfully submitted,

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